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Attorneys for Defendants AMERICAN MEDICAL RESPONSE WEST (errantly sued herein as “AMERICAN MEDICAL RESPONSE, a corporate entity”) and DAMON RICHARDSON

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

IVAN GUTZALENKO, Deceased, through his  
Co-Successors in Interest, N.G. and N.I.G.,  
minors through their mother and Next Friend,  
Honey Gutzalenko, individually and as Co-  
successors in Interest for IVAN GUTZALENKO,  
Deceased,

Plaintiffs,

v.

CITY OF RICHMOND, a public entity;  
RICHMOND CHIEF OF POLICE BISA  
FRENCH, in her individual and official  
capacities; RICHMOND POLICE OFFICERS  
TOM TRAN, MARK HALL, and CEDRIC  
TAGORDA; and DOES 1-10, Jointly and  
Severally,

Defendants.

Case No.: 3:22-CV-02130-EMC

**REPLY BRIEF TO PLAINTIFFS’  
BRIEF RE APPLICABILITY OF  
MICRA TO PLAINTIFF’S ALLEGED  
COUNT 5: ASSAULT AND BATTERY  
AGAINST DEFENDANT DAMON  
RICHARDSON**

Complaint filed: April 4, 2022

**I.**

**MICRA IS APPLCABLE TO PLAINTIFF’S ASSAULT AND BATTERY COUNT AGAINST  
AMR WEST PARAMEDIC DAMON RICHARDSON.**

At the outset, it should be reiterated that the instant lawsuit was not filed on August 9, 2023 as plaintiffs suggest in their opening brief— it was filed on **April 4, 2022**. (See Dkt#1 Complaint.) Further, Count Five within the Second Amended Complaint (Dkt#49) is ***not*** alleged against

1 defendant AMR West and as that is the only Count still remaining against the “medical defendants”,  
 2 AMR West is no longer a named defendant.

3 The court’s dismissal of the negligence cause of action against the medical defendants does  
 4 not change the gravamen of the allegations against the AMR West paramedic DAMON  
 5 RICHARDSON. Despite Count 5 nominally being called “assault and battery” this is essentially a  
 6 medical negligence case as to the remaining medical defendant Mr. RICHARDSON. In this case,  
 7 plaintiff alleges that the paramedic failed to check on the decedent’s vitals and aspirate the syringe  
 8 before administering the Versed. The alleged assault and battery is inextricably intertwined with the  
 9 alleged professional negligence and cannot be separated from it because it is based upon the alleged  
 10 failure to comply with the standard of care applicable to paramedics. Thus, MICRA applies to Count  
 11 5: assault and battery.

12 Plaintiffs admit in their initial brief that plaintiff was having a mental and health emergency  
 13 that required immediate medical care. That is exactly what DAMON RICHARDSON was trying to  
 14 provide. The only way to provide that emergent care and treatment to Mr. Gutzalenko was to calm  
 15 him down so that care could reasonably be provided. This is not a case involving a true medical  
 16 battery in which the patient consents to one type procedure but a completely different one is  
 17 performed such as in *Perry v. Shaw* (2001) 88 Cal.App.4th 658, 668, fn. 4. Thus, the cases cited by  
 18 plaintiffs in their brief are inapposite to the facts and evidence of this case.

19 In their brief, plaintiffs acknowledge that it is undisputed Mr. Gutzalenko could not consent to  
 20 treatment because of the nature of his mental and health breakdown in this emergent situation. “The  
 21 law provides that in an emergency consent is implied.” (*Cobbs v. Grant*, 8 Cal. 3d 229, 243 (1972).)  
 22 A patient should be denied the opportunity to weigh the risks when it is evident he cannot evaluate  
 23 the data, as for example, where there is an emergency or the patient is a child or incompetent. (*Id.*)

24 It is the general rule that in cases of emergency, or unanticipated conditions where some  
 25 immediate action is found necessary by the provider for the health of a patient and it is impracticable  
 26 to first obtain consent to the treatment **which the provider** deems to be immediately necessary, the  
 27 provider is justified in providing care without the express consent of the patient thereto. (*Preston v.*  
 28 *Hubbell*, 87 Cal. App. 2d 53, 57–58 (1948).)

1 Mr. RICHARDSON planned to provide emergent medical care to the decedent but there was  
 2 initially no way to do it while he was being combative. As shown on the police cam videos reviewed  
 3 by the court with respect to defendants' motions for summary judgment, Mr. Gutzalenko was  
 4 combative with police for an extended period of time and when Mr. RICHARDSON returned with a  
 5 vial of Versed to administer it to Mr. Gutzalenko, **the police informed him that he was "faking"**  
 6 **being calm.** Taking no chances, Mr. RICHARDSON injected him with Versed to ensure he could  
 7 provide care and treatment. It is alleged that Mr. RICHARDSON should have checked the patient's  
 8 vitals before administering it but that would relate to the applicable standard of care (negligence  
 9 which has been dismissed) and MICRA would apply.

10 Obviously, in an emergent situation like this one in which the patient is unable to give his  
 11 consent to emergent medical treatment, a paramedic such as Mr. RICHARDSON would be entirely  
 12 disincentivized to provide *any* care and treatment if it could be argued to be a medical battery simply  
 13 because the patient did not consent to it. This would be against public policy and contravene the  
 14 purpose of the MICRA statutes.

15 Plaintiffs argue that the Versed was only administered by Mr. RICHARDSON for his own  
 16 benefit rather than for a medical reason and cites to *So v. Shin* (2013) 212 Cal.App.4th 652.  
 17 However, the facts of *So v. Shin* are entirely distinguishable from the facts of this case. In *So*, the  
 18 plaintiff underwent a dilation and curettage (D&C) procedure following a miscarriage. Plaintiff  
 19 alleged that she was administered inadequate anesthesia and awoke during the procedure. When she  
 20 later confronted the anesthesiologist, the anesthesiologist became angry, shoved a container filled  
 21 with the plaintiff's blood and tissue at her, then urged the plaintiff not to report the incident. The  
 22 plaintiff sued for negligence, assault and battery, and intentional infliction of emotional distress. (*Id.*  
 23 at p. 656.) The Court of Appeal said: "[P]rofessional negligence is only that negligent conduct  
 24 engaged in for the purpose of (or the purported purpose of) delivering health care to a patient . . . .  
 25 [T]ortious actions undertaken for a different purpose . . . are not [professional negligence]. [¶] . . .  
 26 [P]laintiff alleges that [the anesthesiologist] engaged in the alleged tortious conduct for the purpose  
 27 of persuading plaintiff not to report to the hospital or medical group that plaintiff had awakened  
 28 during surgery. In other words, plaintiff alleges that [the anesthesiologist] acted for her own benefit,

1 to forestall an embarrassing report that might damage her professional reputation—not for the benefit  
 2 of the patient.” (*Id.* at pp. 666–667.) “[N]egligent conduct allegedly undertaken by a doctor for the  
 3 doctor’s own benefit, rather than for a legitimate medical reason,” is not “professional negligence.”  
 4 (*Id.*) Unlike in *So*, the alleged wrongdoing by a Mr. RICHARDSON occurred within the scope of his  
 5 provision of professional services as a paramedic.

6 **A. Civil Code Section 3333.2 (Limiting Recovery of Noneconomic Damages).**

7 One purpose of this MICRA provision is to “provide a more stable base on which to calculate  
 8 insurance rates” by eliminating the “unpredictability of the size of large noneconomic damage  
 9 awards, resulting from the inherent difficulties in valuing such damages and the great disparity in the  
 10 price tag which different juries placed on such losses.” (*Fein v. Permanente Medical Group* (1985)  
 11 38 Cal.3d 137, 163; see *Lopez v. Ledesma* (2022) 12 Cal.5th 848, 859–860, 864; *Western Steamship*  
 12 *Lines, Inc. v. San Pedro Peninsula Hospital* (1994) 8 Cal.4th 100, 112; *Lathrop v. HealthCare*  
 13 *Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1419; *Perry v. Shaw* (2001) 88 Cal.App.4th  
 14 658, 668.) Another purpose is to “promote settlements by eliminating ‘the unknown possibility of  
 15 phenomenal awards for pain and suffering that can make litigation worth the gamble.’” (*Fein*, at p.  
 16 163.) “The prospect of a fixed award of noneconomic damages not only increases plaintiffs’ motive  
 17 to settle, as noted in *Fein*, but also restrains the size of settlements. Settlement negotiations are based  
 18 on liability estimates that are necessarily affected by the [applicable MICRA] cap. By placing an  
 19 upper limit on the recovery of noneconomic damages at trial, the Legislature indirectly but effectively  
 20 influenced the parties’ settlement calculations.” (*Rashidi v. Moser* (2014) 60 Cal.4th 718, 727.)  
 21 Another purpose is to be fair to medical malpractice plaintiffs by “reduc[ing] only the very large  
 22 noneconomic damage awards, rather than to diminish the more modest recoveries for pain and  
 23 suffering and the like in the great bulk of cases.” (*Fein*, at p. 163.)

24 **B. MICRA Is Applicable to Count 5: Assault and Battery**

25 MICRA was not enacted to only be applicable to “classic medical malpractice” as plaintiffs  
 26 have argued in their brief. It was enacted for the reasons outlined in defendant’s original brief and  
 27 reflects the strong public policy to contain the costs of malpractice insurance by controlling or  
 28 redistributing liability for damages. The MICRA statutes are to be applied *liberally* and apply to any

1 action for injury against a healthcare provider based upon professional negligence/medical  
 2 malpractice which can include other causes of action such as assault and battery as was alleged in this  
 3 case. (*Preferred Risk Mutual Insurance Company v. Reiswig* (1999) 21 Cal.4th 208, 215.) An action  
 4 is based on "professional negligence" and thereby subject to section 3333.2's cap on noneconomic  
 5 damages when, as in this case, a health care provider's alleged provision of services is "within the  
 6 scope of services for which the provider is licensed" and "are not within any restriction imposed by  
 7 the licensing agency or licensed hospital." (§ 3333.2, subd. (c)(2).)

8 In this case, Mr. RICHARDSON was providing care and treatment to a patient as a paramedic  
 9 for which he is licensed. This court's ruling that MICRA applies to the assault and battery count  
 10 alleged against Mr. RICHARDSON, even though it could be characterized as an intentional tort,  
 11 would be entirely consistent with pertinent case law and MICRA's purpose to "control and reduce  
 12 medical malpractice insurance costs by placing a predictable, uniform limit on a defendant's liability  
 13 for noneconomic damages." (*Salgado v. County of Los Angeles* (1998) 19 Cal.4th 629, 641.) After  
 14 the court's consideration of the purpose underlying each of the individual MICRA statutes, it would  
 15 be appropriate to recognize that the scope of conduct afforded protection under MICRA provisions  
 16 (actions 'based on professional negligence') must be determined by the facts alleged and the  
 17 evidence of the case. (*Central Pathology Service Medical Clinic, Inc. v. Superior Court* (1992) 3  
 18 Cal.4th 181, 192)

19 Although the operative complaint alleges a cause of action against a health care provider on a  
 20 legal theory other than medical malpractice, this court must determine whether it is nevertheless  
 21 based on the 'professional negligence' of the health care provider so as to trigger MICRA.

22 The holding in *Larson v. UHS of Rancho Springs, Inc.* (2014) 230 Cal.App.4th 336, is  
 23 directly on point with this case. MICRA applied to claims for battery and intentional infliction of  
 24 emotional distress because they were based on the health care provider's professional negligence.  
 25 This case is no different. Mr. RICHARDSON's decision to administer Versed was for the purpose of  
 26 rendering professional services. He needed to calm the patient to not only protect himself as a health  
 27 care provider but also so that he could provide medical services. As shown on the video attached to  
 28 the recent motions for summary judgment, Mr. RICHARDSON could not even bandage Mr.

1 Gutzalenko's hand because he was combative even while the police were present. There was no  
 2 reason for him to think that the situation would get any better when it was just, he and Mr.  
 3 Gutzalenko with no handcuffs in place, in the back of the ambulance. Mr. RICHARDSON had to  
 4 provide care and treatment to Mr. Gutzalenko and there was no way Mr. RICHARDSON could do  
 5 that until he could ensure Mr. Gutzalenko remained calm and was not "faking" being calm as the  
 6 police believed he was doing just before the Versed was administered. The question of whether it  
 7 was reasonable for Mr. RICHARDSON to believe the police and not further evaluate the patient  
 8 before administering the Versed is an issue relating to the applicable standard of care/negligence.

9 The count for assault and battery alleged in this case is based on the factual allegation that the  
 10 Versed did not need to be administered prior to Mr. Gutzalenko being placed on a gurney and taken  
 11 via ambulance to the hospital. The alleged professional negligence is inextricably intertwined with  
 12 the "assault and battery" such that MICRA would apply because it relies on the same facts as the  
 13 professional negligence claim that was earlier dismissed. This case is essentially nothing more than a  
 14 professional negligence case and MICRA should apply.

15 Dated: August 28, 2025

HINSHAW, MARSH, STILL & KANTER, LLP

17  
 18 By: /s/ Scott R. Kanter  
 19 SCOTT R. KANTER, ESQ.  
 20 Attorney for Defendant DAMON RICHARDSON  
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**CERTIFICATE OF SERVICE**

I hereby certify on August 28, 2025, I electronically filed this document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all individuals at the e-mail addresses denoted on the Electronic Mail Notice List for this case with the United States District Court for the Northern District of California.

/s/ Anna Obey

Anna Obey